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Saturday, February 5, 1955 Vol. CXIX. No. 6

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NOTES OF THE WEEK

Judicial Breeding

We record with regret the death in London of the Rt. Honourable Sir Malcolm Macnaghten, K.B.E., who was a Judge of the King's Bench Division from 1928 until his retirement in October, 1947.

The English Judicial Bench is remarkable for its family tradition and the late Judge represented a striking example of the judicial pedigree. He was the fourth son of the late Lord Macnaghten, a most eminent Judge and Lord of Appeal in Ordinary. His mother, too, was of judicial descent as the daughter of Baron Martin, a distinguished Judge of commercial causes and the grand-daughter of Sir Frederick Pollock, the famous Lord Chief Baron of the Exchequer.

Macnaghten was born on January 12, 1869, and was educated at Eton and Trinity College, Cambridge. At both he distinguished himself, becoming joint editor of the *Eton College Chronicle*, and taking a first in the History Tripos in 1891 as well as becoming President of the Union at Cambridge. He was called to the bar by Lincoln's Inn (of which he became a bencher in 1915 and treasurer in 1945) in 1904 and soon acquired a substantial common law practice, taking silk in 1919 after only 15 years. His success continued as a leader although it was qualified by his diffident manner.

He became recorder of Colchester in 1924.

In 1922 he was returned unopposed as Ulster Unionist M.P. for North Derry and later in the same year for the City and County of Londonderry by a large majority.

In the House of Commons Macnaghten made infrequent contributions to debate and so acquired no outstanding reputation in the purely political sphere. In 1928 when Lord Hailsham was Lord Chancellor he was promoted to be a Judge of the King's Bench Division and in this capacity his characteristics of kindness and courtesy came to the fore.

Amongst the famous cases upon which he adjudicated was the case of *R.* v. *Bourne* in 1938. This was the case of a well-known surgeon who was charged with procuring the miscarriage of a girl, aged 14, who had been the victim of rape. The learned Judge's summing up became a leading case on the law of abortion.

After his retirement in 1947 the late Judge did not wholly give up his judicial duties for after his appointment to the Privy Council (1948) he helped an under-staffed Judicial Committee to deal with appeals from the Dominions and Colonies.

We mourn the passing of a Judge who exemplified judicial courtesy and consideration.

The Wrong Charge

Examining justices may commit a person for trial upon any charge which the evidence supports, and are not limited to the offence or offences preferred in the first instance. In summary proceedings, however, the defendant is tried in respect of the information laid and the court is not entitled to convict upon some offence other than that charged, *Martin* v. *Pridgeon* (1859) 8 Cox 170 ; 23 J.P. 630.

Recently before a west-country magistrates' court, a young woman was charged with offences in connexion with obtaining money and misappropriating part of it, and also using a forged document. Apparently the charges were tried summarily, and it seems that one charge was of obtaining the money by false pretences with intent to defraud. Her solicitor is reported as saying that morally there were no merits in the defence, but that the court was not a court of morals, and he submitted that the wrong charges had been preferred. The defendant would, he said, have had to plead guilty to certain charges if they had been made, but as she had no fraudulent intent when she obtained the money, as she could properly do, her subsequent conduct did not affect the matter so as to justify a charge of false pretences. The case was dismissed.

The defending advocate took a perfectly proper course in making his submission, and it was his duty to his client to put forward a legal point in her favour. Even if he had not done so the

magistrates might well have decided that on the evidence the offence alleged had not been proved, whatever other offences might have been committed. If the point was sound, effect should be given to it.

To any layman who might say, not unnaturally, that if a person has committed a criminal offence he ought to be dealt with and not escape upon a technicality, the answer is that, subject to any question of a time limit for proceedings, there is nothing to prevent the prosecutor from preferring the correct charge or charges after the dismissal of the original charge. This does not often happen, but if it were thought desirable there might be such proceedings.

As to taking legal points, it is commonly said that the best defence of all is a good point of law.

Appeals to Borough Quarter Sessions

Not for the first time, the question of appeals being heard at quarter sessions for a borough by the recorder sitting alone has been raised and the system criticized. A well-known Yorkshire paper, *The Telegraph and Argus*, commenting on the result of such an appeal, points out that in the superior courts appeals are generally heard by three judges, while in quarter sessions for a county the appeals come before a bench usually under the chairmanship of an eminent lawyer. If such a chairman sits not alone but with lay justices, it is argued, lay justices should sit with the recorder. Upon questions of fact, which are usually involved, the lay justice or a jury is quite competent. The article concludes by inviting justices to impose what they consider to be proper penalties, even if those penalties may be substantially reduced on appeal.

The matter is of some importance, and it is true that a great many people find it difficult to understand why, in these days when most quarter sessions for counties have as a chairman a lawyer no less distinguished than most recorders, perhaps a judge, he should sit with lay colleagues, while the recorder must sit alone. If it were a matter of deciding questions of law only, it might be thought reasonable to leave matters in the hands of a single lawyer, chairman or recorder as the case might be, but it is contended that on questions of fact the opinions of several members of a court is to be preferred to that of one. The same applies to the question of sentence.

Delay in Prosecuting

The chairman of the Bristol juvenile court recently criticized a prosecuting authority for delay in bringing before the court three boys, aged from nine to 11 on charges of trespass on a railway and doing wilful damage. The offences were alleged to have been committed in November, and the hearing was in January. The chairman said the magistrates felt strongly about this, as boys of such an age ought not to have charges hanging over them for so long.

It is good practice to bring proceedings before a court as soon as possible, and for the court to arrange the hearing as early as the state of business allows, subject to any reasonable request for a later date to be fixed. The sooner the witnesses are warned to attend, the less likely they are to cease to be available or to forget some of the facts to which they are expected to testify. It is also true that defendants who may be worried about the outcome of the case would generally be relieved to know that there will be no delay. They want to get it over, one way or the other. In the case of juveniles, some undoubtedly worry intensely, even if some others are, apparently, quite unmoved. Moreover, if there is to be punishment, the sooner it comes after the offence the more the offender realizes that punishment follows misconduct, and the more likely that punishment will act as a deterrent.

Swifter Justice

At the beginning of the last Law Term one of the Queen's Bench masters of the Supreme Court (Master A. S. Diamond) gave an address to members of the bar in the Niblett Hall, of the Inner Temple.

This address was of great interest to legal practitioners because it dealt with the amendment of rules of the Supreme Court devised to effect acceleration of legal procedure and the trial of actions.

Complaints about the " law's delays " are perennial but in the past attempts to solve them have not met with notable success. On this occasion the learned master, was at pains to emphasize the importance of co-operation between the bench, officers of the court and the legal profession as a whole in the pursuit of this laudable but often difficult objective of speedier justice. At the outset of his speech Master Diamond underlined the duty, on the part of the master at least, to see that the area of dispute is reduced as much as possible, by agreement or otherwise, and that by this and other means the decision of the trial judge is obtained with the minimum expenditure of time and money.

With those objects in view Orders XXX (Summons for Directions), and XXXVII (Evidence to be given at trial) have been re-written and in Rules of the Supreme Court (Summons for Directions etc.) Order, 1954, S.I. 1956, No. 161, are to be found the amendments. The effect of these is to make the Summons for Directions the most vital stage in preparations for trial.

It will be remembered that the Report of the Evershed Committee which was described and commented upon in our issue of May 22 last, recommended a " robust " attitude on the part of masters towards the new powers the committee favoured and to which effect has now been given. Master Diamond said that he took the adjective " robust " to mean that the master is not to pay too nice a regard to forms and technical procedure but with independence, initiative and common sense to make as the new rule says such orders as are " best adapted to secure the just, expeditious and economic disposal of the action."

The functions of the master on the hearing of the Summons for Directions will be two: (1) to limit the issues so far as possible; (2) to make orders reducing the cost of the evidence.

Under Order XXX, r. 4, it will be the master's duty to try and see that the parties make all admissions and all agreements as to the conduct of the proceedings which ought reasonably to be made. Considerably greater powers are given to masters by Order XXXVII to cheapen the evidence given at trial (*e.g.*, he can order evidence to be given by affidavit, or order evidence of any particular facts to be given in any way he thinks fit). Wider use of the powers contained in the Evidence Act is also envisaged and the master may also limit the number of medical or expert witnesses who may be called at trial.

A new form of Summons for Directions has been drafted. This is a formidable document which sets out all the possible orders which may be made by the master upon the application. The object of this is to remind practitioners of the many and various courses open and to help the master by reducing the work of writing out his order.

It is not, however, expected that the new and " robust " procedure will enable much scope for reduction of costs in actions for fraud or wherever the issue depends on what was said or done by a party, for example, libel or slander actions, breach of promise of marriage, seduction, enticement or harbouring of wife or servant. If, however, the new orders operate so as to save expense in running-down or works accidents and actions on contracts then a substantial improvement will have been achieved.

ADMISSIBILITY OF SIMILAR FACTS: THE TEST OF RELEVANCY

[CONTRIBUTED]

In the previous article entitled, "Proof of other offences admissible evidence as to credibility," at 118 J.P.N. 602, the view was expressed that in the case of indecent assault of *R.* v. *Mitchell* [1952] 36 Cr. App. R. 79 the evidence of a girl of 11 years of age named Judy, who had been referred to in evidence by the girl who was the subject of the actual charge in the case, named Sheila, was admissible as evidence of credibility upon the principle laid down in *R.* v. *Chitson* (1909) 73 J.P. 491, and that this ground of admissibility was distinct from the ground of admissibility laid down in the case of *Makin* v. *Attorney-General for New South Wales* (1894) 58 J.P. 148, and certain subsequent cases, that is to say as being admissible as evidence of "similar facts." Following upon this article questions have been raised by one of the contributors to this journal regarding (1) the relationship between these two cases on admissibility, and (2) the bearing of credibility upon the issue of corroboration of Sheila's evidence. It is proposed therefore to discuss these two questions, but in the reverse order, first of all discussing the principle in *Makin's* case. For it is vital at the outset of a discussion on the admissibility of evidence of "similar facts" to know what in fact is the principle which was laid down in *Makin's* case, and how far it has been extended by subsequent cases, and then to see the bearing of this principle upon the principle involved in the decision in *Chitson's* case, and how far, if at all, the principle of this second case is a divergence from it.

I. THE PRINCIPLE IN MAKIN'S CASE

The judgment in *Makin's* case was delivered in the Privy Council upon an appeal on a special case stated by the Supreme Court of New South Wales which raised the question, *inter alia*, whether, upon the trial of the two appellants for the murder of a small child whose body was found in the garden of a house occupied by them, and who had been received by them for adoption from their mothers, evidence was admissible of the finding of the bodies of other children in the gardens of several houses occupied by them, who had been received by them from their mothers for adoption upon the same terms. In holding that this other evidence was admissible, Lord Herschell, L.C., first states the general rule as regards the admissibility of such other evidence, and then he proceeds to refer to the general principle underlining the exception to it, illustrating this by giving certain specific examples of such exception. He says: "In their lordships' opinion the principles which must govern the decision of this case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be so relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed, or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line, and to decide whether a particular piece of evidence is on the one side or the other." The Lord Chancellor in his judgment is thus stating the general rule to be that evidence of other criminal acts is inadmissible for the purpose of showing that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is then being tried. He points out, however, that there is an exception to this general rule, and he states that this exception arises where the evidence of such other criminal acts is relevant to an issue before the jury, stressing that it is this relevancy which renders it admissible notwithstanding that such other evidence tends to show the commission of other crimes. Finally, he concludes by giving three specific examples of such relevancy as admitting evidence of such other criminal acts, namely, where such evidence bears upon the question whether the acts alleged to constitute the crime charged in the indictment were (1) designed, or (2) accidental, or (3) rebuts a defence which would otherwise be open to the accused.

Although this decision is that of the Privy Council whose judgments are not binding on the courts of this country, it was accepted by the House of Lords in *R.* v. *Ball* (1911) 75 J.P. 181, as laying down the correct principles to be applied in a criminal trial in the English courts.

(1) *System*

It is now proposed to consider the particular examples of relevancy forming the exception to the general rule of inadmissibility which are enumerated in Lord Herschell's judgment. First, where the evidence of similar facts is sought to be admitted by the prosecution in order to prove a system or course of conduct. In *R.* v. *Bond* (1906) 70 J.P. 424; where upon a charge against a doctor of feloniously using certain instruments on a certain woman with intent to procure her miscarriage evidence of the felonious use of similar instruments on another woman on a previous occasion was held admissible, Bray, J., has this to say of what is meant by the word "system": "The word 'system' implies a connexion between the acts of which evidence is sought to be given and the act with which the prisoner is charged. A number of acts of theft do not as a rule constitute a system. They are isolated acts having no connexion with one another. On the other hand, the transactions of a long firm are the result of a formulated scheme and part of a system. The ground on which in cases of this class evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, and that the act with which the prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given, when proved, will show the existence of the plan, and, therefore, the guilty mind of the prisoner." And A. T. Lawrence, J., says: "A system is not necessarily criminal; most men carry on business on a system, they may even be said to live on a system. Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person." (As regards the proof of a system, Bray, J., stated that he did not think that the proof of but one similar case, without any special connexion with

the case charged in the indictment, would prove, or indeed would be evidence of, such a system, but that when evidence of such a class is tendered the Judge should require an assurance from the counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system, and that before admitting such evidence the Judge should satisfy himself that the evidence tendered would, if true, establish, or tend to establish, what he (Bray, J.) had called a system ; and Kennedy, J., in the same case stated that in his view the admissibility, not merely the weight, of such evidence depended upon the evidence which it was proposed to adduce being evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the same criminal object.)

(2) *Accident*

Secondly, where such evidence is sought to be admitted to negative a defence of accident or mistake. The principle on which such evidence is admitted in such a case is stated thus by Bray, J., in *R.* v. *Bond* in distinguishing a case where evidence is sought to prove system from a case where it is sought to disprove accident or mistake. After referring to an earlier case of murder by poison where, in order to show that the prisoner administered the poison for the purpose of killing her husband, the prosecution required to negative accident or mistake, and for this purpose evidence was admitted of the death of two of the prisoner's sons from the same poison about the same time and while they were living with the prisoner and had eaten food prepared by her, he says : " The principle on which this evidence was admitted is not expressly stated further than by saying it was admissible to disprove accident or mistake, but it obviously is this : If there had been but the one case charged in the indictment, it was possible though not probable, that the arsenic might have got into the food by accident or mistake, but where two other cases are proved where death happened on previous occasions to other inmates under similar circumstances, accident or mistake becomes so improbable as to be almost impossible. The proof of each additional case increases the improbability of accident or mistake, and therefore tends to disprove it. It was necessary, of course, to show that the other deaths happened under similar circumstances, but it was not necessary to prove a system, or that the prisoner had conceived a plan to poison all her family. One other death under similar circumstances would tend to show the improbability of accident or mistake, and would, on that ground, be admissible." He then refers to certain other earlier cases decided on the same principle, such as *Makin's* case. (A later example of a case where such evidence was admitted to negative a defence of accident is to be found in *R.* v. *Smith* (1915) W.N. 309, the brides in the bath case.)

But intention must not be confused with accident, and in *R.* v. *Harrison-Owen* (1951) 115 J.P. 545, where the defence to a charge of burglary was that the entry was made when the appellant was in a state of automatism, that is to say that the act was, not a voluntary, but an unintentional, act, it was held that it was not permissible for the prosecution to cross-examine the appellant as to his previous convictions for larceny, housebreaking and like offences, in order to show that his act was not voluntary.

On the other hand, where it is necessary to prove a criminal intent, *mens rea*, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, it is open to the prosecution in order to show the true situation to give evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and so was acting criminally, and not innocently (*see R.* v. *Armstrong* (1922) 86 J.P. 209 where, upon a charge of murder by administering arsenic, evidence of the administration of arsenic to another person on another occasion was held admissible to disprove a suggestion that the accused had purchased and kept arsenic for an innocent purpose).

The admissibility of such evidence in order to prove that the relationship between two persons is a guilty, and not an innocent, one has been established in a number of cases. Thus, in *R.* v. *Ball, supra*, upon a charge against a brother and sister of incest evidence of previous acts of the two defendants was held admissible with the object of establishing that they had a guilty passion towards each other, and to rebut the defence of the innocent association as brother and sister, and in two recent cases of a homosexual nature such evidence was admissible for a similar purpose ; *R.* v. *Sims* [1946] K.B. 531 ; *R.* v. *Hall* (1951) 116 J.P. 43. (Although certain passages in the judgment in *R.* v. *Sims* were criticized in *Noor Mohamed* v. *The King* [1949] A.C. 182 in the Privy Council, where the board took the view that evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, no opinion was expressed of the propriety of the actual decision, and both this decision and that of *R.* v. *Hall* were approved by Lord Simon in *Harris* v. *Director of Public Prosecutions* (1952) 116 J.P. 248.)

(3) *Rebutting a Defence*

Thirdly, where such evidence is sought to be admitted in order to " rebut a defence which would otherwise be open to the accused." When Lord Herschell used the above words, he was said by Lord Simon in *Harris'* case not to be using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. Lord Simon went on to state that the substance of the matter appeared to him to be that the prosecution might adduce all proper evidence which tended to prove the charge, and that he did not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused had set up a specific defence which called for acquittal. He then gives an instance where, *mens rea* having an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, being consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged, and was thus acting criminally ; and he gives as an example of such a case, *R.* v. *Mortimer* [1936] 25 Cr. App. R. 150. Thus, the accused is not able by confining himself at the trial to one issue to exclude evidence that would be admissible and fatal if he ran two defences. (*See R.* v. *Armstrong, supra.*)

Also, as the cases of *Armstrong* and *Mortimer* show, the evidence of similar facts may consist of similar facts occurring either previous or subsequent to the occurrence which is the subject of the charge for which the accused is being tried, and such evidence may show an offence of a different character from that which is the subject of the charge ; *see R.* v. *Starkie* (1922) 86 J.P. 74 ; *R.* v. *Mortimer.*

Again, where the defence is one of identity, that is to say that the accused is not the person who committed the crime, such evidence may be given to prove that it was in fact the accused who committed the crime in question (*see Perkins* v. *Jeffery* (1915) 79 J.P. 425), and in order to prove such identity evidence of abnormal propensity on the part of the accused is admissible as a means of identification. Thus, evidence is admissible of other offences committed by the accused which, from the similarities between the circumstances in which they were committed and the method employed in their commission and those of the offence which is the subject of the charge, tend to show

that they were committed by the same person (*see* as examples of this, *Thompson* v. *The King* (1918) 82 J.P. 145, where evidence was admitted to show that the accused was a person who suffered from the abnormal propensity of homosexuality, and *R.* v. *Straffen* (1952) 116 J.P. 536, where evidence was admitted to show that the accused was a person who had the abnormal propensity to strangle young girls, and to do so without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies about where they could be seen and where, presumably, their deaths would be detected). In concluding this discussion on the principle laid down by Lord Herschell in *Makin's* case, it is as well to remember the observations of Lord Simon in *Harris's* case as follows. " It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty."

II. CREDIBILITY AND CORROBORATION

It must be admitted that the use of the word " credibility " in the previous article may have led, understandably, to a certain confusion of thought—a confusion in the first instance, it would appear, due to the use of this word by A. T. Lawrence, J., in his judgment in *Chitson's* case, an extract from which has been set out in the article. In his judgment as reported in (1909) 2 K.B. 945, the learned Judge makes it clear that the ground of admissibility of the questions put to the accused to which objection was taken was that the questions corroborated the prosecutrix's story. He says, at p. 947 : " The prisoner himself gave evidence, and in the course of his cross-examination he was asked the questions, which it is said ought not to have been allowed, with the object of proving that he had made the statement and that it was true that he had had immoral relations with the girl Hearn. Although the latter questions did no doubt tend to prove that he was of bad character, still they also in our opinion tended to show that he was guilty of the offence with which he was charged, for if he had made that statement to the prosecutrix at the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connexion with her." And in the report in 2 Cr. App. R. 375, at p. 327, he says : " The evidence objected to was admissible. There was no way in which the prosecutrix could have known about the ' other ' girl unless she knew it from him. Therefore the question whether in fact those relations had existed became vital to the issue whether prosecutrix was telling a true story. . . . In his cross-examination he denied that he had made any such statement to her, and was then cross-examined as to the truth of the fact contained in the statement. We do not think this was evidence as to the character of the prisoner—which would be inadmissible—but evidence as to the credibility of his story. Credibility is not the same thing as credit." The ground therefore of the submission in the article that in Mitchell's case the evidence of the girl Judy would be admissible is that her evidence would corroborate the evidence of the girl Sheila as to what the accused had told her in connexion with his relations with Judy. The second cause of confusion was the stressing in the previous article that the question of corroboration was a matter which was outside its scope. This was intended to make it clear that it was not the question of the necessity for the corroboration of Judy's evidence with which the article was dealing, and it was not intended to imply that the evidence of Judy was not in itself corroboration of Sheila's evidence, and it is regretted that the article should have given rise to such an inference. The case of *Credland* v. *Knowler* [1951] 35 Cr. App. R. 48 makes it clear that credibility may amount to corroboration, as the correspondent helpfully points out.

III. THE RELATIONSHIP BETWEEN MAKIN'S CASE AND CHITSON'S CASE

As regards this relationship the judgment in *R.* v. *Lovegrove* (1920) 85 J.P. 75, where evidence of similar facts was held admissible upon the ground of corroboration, illustrates the differing principles underlining each of the two cases. There the appellant had been convicted of manslaughter in the felonious user of certain instruments to procure the miscarriage of a certain woman (a Mrs. Purcell), and at the trial the evidence of a certain woman (a Mrs. Type) was admitted to the effect that she had on two previous occasions gone to the appellant's house, and that the appellant had performed an operation on her as the result of which she had a miscarriage, and that on a later occasion she had had a conversation with the dead woman's husband (Mr. Purcell) and had given him the appellant's address which he wrote down in her presence on a piece of paper which was produced at the trial. The husband stated in evidence that in consequence of this statement to him he had gone to the appellant's house one morning and that later in the evening he and his wife went there again, and that subsequently the appellant has performed an operation on his wife. The appellant in her defence stated that the husband had come to see her to discuss terms for rooms to let, but that neither he nor his wife had gone there in the evening, and that she had never seen the wife nor performed an operation on her or on Mrs. Type, and that Mrs. Type had only been to her house on one occasion with the object of borrowing some money. In holding that the evidence of Mrs. Type was admissible, Lord Reading, C.J., says this, in distinguishing the principle upon which her evidence was admissible from the principle laid down in *Makin's* case which has been set out above : " The evidence of Mrs. Type established that Purcell had spoken to Mrs. Type about his wife, and that she, Mrs. Type, had a conversation with him and had given him the appellant's address. Evidence is admissible if it tends to prove that the prisoner has committed the offence charged. One step in the proof of the offence charged was that Purcell went to the appellant's house one morning to arrange with her for the performance of an illegal operation on Purcell's wife, and that he went there in consequence of information which he had received from Mrs. Type. It is contended that the evidence of Mrs. Type relating to the operation previously performed by the appellant on her was inadmissible on the general principles of *Makin* v. *Attorney-General for New South Wales*, *supra*, *Rex* v. *Bond*, *supra*, and similar cases. We, in this case, are not intending to deal in any way with the general principles of those cases, and we do not intend to extend or restrict the principles laid down therein . . . But this case does not depend on the principles there laid down . . . The evidence here tends to prove that the testimony of Purcell that he asked the appellant whether she had brought about miscarriages even up to after five months, and that she had said yes, but that it was very dangerous after four months, was in fact true. It tends to establish that the conversation as stated by Purcell did in fact take place. It is therefore admissible on that ground."

From a consideration of the above earlier cases therefore it appears that the principle of *Makin's* case, as it is called, operates when it is desired to admit evidence at the trial of similar facts showing that the accused has been guilty of criminal acts other than those covered by the indictment which are relevant as bearing upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused, bearing in mind the above words of Lord Simon that the

list of the sort of cases in which this principle operates should not be regarded as a closed one. From a consideration of *Lovegrove's* case, it appears that the principle in *Chitson's* case equally operates as regards the admitting of such evidence of similar facts, the relevancy in such a case bearing upon the question of corroborating the story told by the prosecution and tending to prove that the story told by the accused is untrue.

In the true sense, of course, the principle of *each* case can be said to come within the second proposition laid down in *Makin's* case, namely, that the mere fact that the evidence adduced tends to show the commission of other offences does not render it inadmissible if it be relevant to some issue of fact which the jury is called upon to determine, but it would appear that, when the principle of admissibility of such evidence is referred to as "the principle in *Makin's* case," the meaning is that which has just been stated.

It should, however, be observed in conclusion that even if such evidence of similar facts is in law admissible, there is a rule of judicial practice restricting the admission of such evidence whereby the judge at the trial considers whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If he considers that, so far as that purpose is concerned, the evidence can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. This rule of judicial practice flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. (*See* the Privy Council case above of *Noor Mohammed*, and *Harris's* case, where Lord Simon re-states the rule.) More recently Devlin, J., in *R.* v. *Miller* (1952) 116 J.P. 533, affirmed this rule of judicial practice as applying to a question asked in cross-examination by the prosecution, but in so doing he stated that no such limitation applies to a question asked by counsel for the defence who was held entitled to ask a question of a witness for the prosecution tending to show that a co-defendant had previously committed a criminal offence, such a question being relevant to an issue before the jury.

M.H.L.

IMPROVEMENT GRANTS: SALE OF HOUSES

We are grateful to a number of correspondents who have drawn attention to an inaccuracy—a more modest term than "misleading over simplification"—in one of the contributed articles by "Essex," on local authorities and the Housing Repairs and Rents Act, 1954. In considering the conditions imposed on a house improved with the aid of a grant it was stated, at 118 J.P.N. 748, that "there is no provision permitting the sale of the house subject to the conditions. If a house is to be sold it is necessary first to buy out the conditions by repaying a proportionate part of the grant, according to the number of years the conditions still have to run, with compound interest."

The true position, as has been pointed out to us, and as is admitted by our contributor, is given in para. 18 of the Practice Notes issued with circular 4/51 by the, then, Ministry of Health. "If a house in respect of which a grant has been made is sold to a person for his own occupation, the grant will have to be repaid, but, if it is sold and the purchaser undertakes to let the house and otherwise comply with the conditions of the grant, no breach would be involved."

The point raised, however, is an extremely interesting one and should not be left there. The theoretical effect of s. 23 (1) (*b*) of the Housing Act, 1949 is as the Ministry say, but our contributor does not feel that he was so far astray about the practical effect. In these days, the words "sale" and "purchase" suggest, it is argued, acquisition by a person who wishes to live in the property himself, and therefore the applicant for a grant would be misled if he were told that the property could be sold without paying back the unexpired part of the grant—subject to some partially understood proviso about keeping it available for letting, into which the inquirer would probably read a non-existent exception in favour of the purchaser himself, on the analogy "I am an owner and I can—he will be an owner and he can."

That point, we think, is worth bearing in mind, for few people at present buy houses in order to let them. What is common is the person who cannot sell at what he regards as a reasonable price, and perhaps can not find a purchaser at all, because he cannot give vacant possession. But that problem is beside the point at issue here, although it may serve to introduce the price aspect of the problem. The house sold subject to a condition precluding occupation by the owner will, for a number of years, be sold at a "sitting tenant" price even though vacant possession will actually be given. (Sitting tenant price, of course, only so far as the outstanding amount of the grant covered the difference between this and vacant possession price.)

So much for the legal and practical position. What is more interesting is to consider why it came about.

The only two alternative courses which could have been followed are either that it could have been sold for the new owner to occupy (or let, of course), or that the house could not have been sold at all without paying back the grant.

It is obvious that the first alternative was deliberately rejected. If any owner for the time being could have lawfully occupied the house (*i.e.*, if the distinction between "applicant" and "owner" was unintentional) then there would have been no reason to make special provision for a member of the owner's family or a person beneficially entitled on the owner's death.

As to the second alternative, the very distinction between "applicant" in this paragraph, and "owner" elsewhere in the relevant sections of the Act shows that sales subject to the conditions were expected.

So the distinction is deliberate. Is there then something about an applicant that qualifies him for occupation but which subsequent owners may lack? Surely not, for local authorities were definitely instructed that, in taking decisions on the applications, they were to disregard the owner's circumstances and consider only the state of the property and the works proposed.

The answer, we suggest, is to be found in the reference already made to vacant possession price and depleted price. If a successful applicant were able to sell at full vacant possession value, which would be the case if the purchaser could occupy immediately, the grant would in effect be a cash payment into his pocket,

because he would probably cover the cost of the improvements in the sale price of the house. Thus, take the case of an improved house of a value of £1,000; assume that the improvements cost £200; the value of the unimproved house would have been £800, because a prospective purchaser deducts the cost of the work he would have to do from the price he would pay were the house as he would want it. So the applicant's profit and loss account would read:

	£		£
Asset in hand	800	Sale price	1,000
Expenditure	200	Grant	100
Profit	100		
	1,100		1,100

CAPITAL LEVY—II

In our issue of October 24, 1953, we commented upon the fact that capital owned by applicants for grants from public funds was in general ignored by local authorities in deciding the amounts to be allowed. We gave examples at that time of information obtained by one authority which had made an inquiry about capital held by recipients of its bounty: the figures were distinctly interesting and attracted the attention of the national press, where they were widely quoted. Our readers may recollect that one parent who owned capital worth £28,500 had been receiving an annual grant of £105 plus fees in respect of his child's university education: needless to say, this unneeded donation promptly ceased when all the facts came to light.

The question of capital assessment is, of course, one of general principle which should apply, or not apply, equally to all applicants for assistance from public funds: it arises wherever a charge for a service or a contribution to an individual by a local authority is made, and that charge or contribution is graduated according to the available resources of the applicant. Thus it is applicable to payments for accommodation in hostels for the aged, the provision of home helps, the care of children deprived of a normal home life, and educational awards of various kinds of which the most important are those in respect of university education. Incidentally, in our previous note we called attention to the wide variations of policy as between one local education authority and another in determining the criteria of eligibility for university awards, both major and minor. Recently the Parliamentary Secretary to the Minister of Education referred in the House to the same point and a list was published showing the number of university awards (divided between major and minor) taken up in 1953/54 per 10,000 of population aged 5-14 years in each authority's area. The national average is 16·5 per 10,000 but variations of this kind were revealed:

Local Education Authority	*Number of Awards taken up per 10,000 of population aged 5-14 (1% sample 1951 census)*	
	Major Awards	*Minor Awards*
Dorset	6·1	0·6
Isle of Wight	7·7	
Somerset	8·1	0·5
Great Yarmouth ..	5·2	
West Bromwich ..	6·3	
Rochdale	6·6	1·1
Carmarthenshire	45·9	2·2
Cardiganshire	45·3	
Merthyr Tydfil	41·5	
Burnley	35·0	1·9

The Ministry is to seek an improvement from those authorities whose figures are below the national average; the result of these exhortations will be revealed by later statistics. In the meantime we suggest that if capital held by applicants is properly assessed all authorities will reduce their total disbursements or, if available cash is rationed, spend their existing allocations more fairly.

It may be argued that to require the use of capital in this way is a discouragement to saving, which requires encouragement instead. But we are continually being told that the biggest single deterrent to saving at the present time is the heavy burden of taxation, particularly at national level; therefore we must welcome any means by which true economy in public expenditure can be achieved, whether the saving be great or small. (In passing, our inquiries lead us to believe that in many cases the saving would be substantial.) The regressive nature of much taxation is a factor that should be given weight in considering this question. The lower a man's total income the greater proportion of it paid in rates and in taxes forming part of the purchase price of the goods he buys. We do not think there can be any argument that it is wrong to require a man earning, say, £7 a week and having no capital to pay over part of that relatively small income in taxation of one kind or another to enable another man with a capital of £28,500 to draw on public funds in aid of the cost of his child's education. Nevertheless, there is another picture to consider: if all capital held of whatever kind or description is taken into account the assessment may be unjust in its severity, as the following example shows. A widow has income from interest on capital amounting to £100 on a capital of £2,500 and her only other income is her state pension and allowances of £2 5*s.* 6*d.* per week: if capital is fully assessed she will be regarded as capable of paying for her son's university education in full. The problem, therefore, is to devise a scale which is fair to all parties—not an easy matter and, in the end, one which will be solved with varying degrees of bias in one direction or the other according to varying individual ideas of justice.

There is little that is useful to guide local authority members in making a decision. The National Assistance (Determination of Need) Regulations, 1948, which apply to the assessment of requirements and resources of applicants for national assistance and the contributions required from residents in local authority provided hostels for the aged, disregard the value of a residence in which a person resides, in relation to war savings (as defined in the National Assistance Act, 1948, sch. 2, paras. 7, 8 and 9) the total amount held up to £375, and in relation to other capital up to £400. So far as other capital held (including war savings of more than £375) exceeds £50 it is to be treated as equivalent to a weekly income of 6*d.* for each complete £25. Capital resources (including war savings of more than £375) exceeding £400 are treated as part of the available resources of the applicant.

The Ministry of Education refer to the question of capital assessment in their annual report for 1952, in making the following comment about vacation allowances:

"Equally it was felt that the Ministry could no longer ignore the capital resources of parents whose income was above a certain level. The normal vacation rate was therefore fixed at £20 for London

and the civic universities and £25 for Oxford and Cambridge, where vacations are longer, compared with a flat rate of £31 for all universities in the previous triennium. It was also arranged that this would be paid automatically only to students whose parents' incomes did not exceed £1,000 *per annum ;* other parents would be required to satisfy the Minister that they did not possess substantial capital resources from which they could finance their children's keep during vacation."

Up to the present the Ministry do not appear to have considered applying a similar test to university awards in general.

Apart from the kind of scale to be adopted there are obvious difficulties in valuing certain kinds of capital held, for instance, in businesses. These are not, however, impossible of equitable solution.

We have indicated previously why it is likely that methods of assessment will vary, and do not therefore intend to conclude this note by suggesting a definite scale : we merely record a few suggestions for consideration.

(*a*) Certain kinds of property are best valued by experts : real property by the local authority's valuer, and business capital by their treasurer.

(*b*) The ascertainment of net capital is required and therefore capital liabilities such as amounts borrowed on mortgage, other loans, bank overdrafts, etc., should be deducted from gross assets.

(*c*) Exclusion from the computation of the value of a dwelling-house owned and occupied.

(*d*) Exclusion, on a graduated scale, of other capital resources owned. For example, exclude completely the first £2,500, three-quarters of the next £1,000, one-half of the next £1,000, one-quarter of the next £1,000. Assess in full any remaining balance.

Thus a man receiving £800 a year, owning the house in which he lives and investments of £3,000, and having another child at school in addition to the one for whom assistance is sought, would be assessed, assuming the allowable expenses against his annual income to be £400 and the charge on assessable income to be £10 on the first £100 and £10 for every additional complete £50 above the £100, to pay £70 on his income and £125 (one-quarter of (£3,000—£2,500)) on his capital. If the total cost is £250 *per annum*, the amount remaining chargeable to the ratepayer and taxpayer would be £55 for the year.

It will be observed that if there is no change in the contributor's capital (apart from its diminution by the assessed contributions) he would be left at the end of four years with capital of £2,658, having paid out in each of those years :

	Ex income	*Ex Capital*	*Total*
	£	£	£
Year 1	70	125	195
„ 2	70	94	164
„ 3	70	70	140
„ 4	70	53	123

In the same period the contributions levied upon the ratepayer and taxpayer would amount to £378.

ANNUAL REPORT OF MINISTRY OF HEALTH—II

(*Concluded from p.* 73, *ante*)

ACCIDENTS IN THE HOME

The report of the Chief Medical Officer shows that 5,895 persons died as a result of accidents in the home or in residential institutions. This is an increase over previous years and it still remains true that about four-fifths of these fatalities occur in children under five years and in elderly people of 65 years and over. Proportionally there has been a slight reduction in the number of fatalities in young children, but this is to some extent off-set by an increase in the number in old people. The number of fatalities from burns has stopped rising but the number of fatal clothing burns from electric and gas fires remains steady. There has been a rise in the number of fatalities from the unguarded open fire. An increased number of local authorities are showing an active interest in accident prevention and the medical officer of health and his staff are particularly concerned.

In one county borough special attention has been given to the prevention of accidents in the home. Health visitors and nurses have received special instructions in the subject while general practitioners and hospital medical officers have agreed to notify such accidents to the health department. Visits to the home are then made. Much valuable information has thus been acquired which has been used in the compilation of teaching material dealing with the prevention of " these domestic hazards to life and limb." Local home safety exhibitions are being held and detailed surveys are being made in conjunction with local hospitals. The Royal Society for the Prevention of Accidents has been very active in this field, and as a result 45 local home safety committees have been established and the number is increasing. These committees are representative of local interests and the medical officer of health usually plays a leading part. In addition, the society has recently inaugurated a home safety group which, it is hoped, will have a special interest for health visitors, school nurses, midwives, district nurses and nursery matrons and indeed all interested in this field of public health.

THE ELDERLY, THE HANDICAPPED AND THE HOMELESS

The chapter dealing with the services for these categories is of particular interest to welfare authorities and shows how, in this other connexion, much progress has also been made since the new scheme came into operation. The number of persons in residential accommodation under the National Assistance Act increased from 47,931 in 1949 to 65,933 in 1954, but it seems strange to note that whereas 4,000 more men than women were accommodated in 1948 ; the position was reversed by the begin- of 1954, representing an increase of 60 *per cent.* in the number of women accommodated against 20 *per cent.* in the number of men. We wonder if this may be because many women who would not go to an institution are quite happy to go to an old people's home. On joint used arrangements between the hospital authority and the local authority while it is admitted that such arrangements facilitate in many instances the two-way transfer of borderline infirm cases, especially where a geriatric unit exists, the " broad picture represented by joint-user occupation is tolerance for the present of a somewhat unsatisfactory administrative arrangement which, as financial and other resources permit, both sides will be anxious to bring to a conclusion with all reasonable speed."

By December 31, 1953, local authorities had provided 699 small homes for old people as compared with 63 which existed before the Act came into force—a very good achievement. Every local authority has opened one or two more small homes. These

are mainly in converted buildings but more new building is now being undertaken and it is stated that " it is pleasing to record that it is now common practice in both county and county borough areas to reserve sites for old people's homes on housing estates about to be developed ; by general consent this is the most suitable and satisfying solution for the old people." Reference is made to different types of buildings which have been erected and in particular to a house set in a crescent of three-storey houses, the rest of which provides ground-floor flats for old people and family accommodation above. It is suggested that " sometimes local authorities have tended in these newly built homes to set a standard of decoration and furnishings which is likely to be not only unnecessarily costly in itself, but also less acceptable to the residents who prefer a good but not luxurious standard of comfort of a more homely character." We hope this caution will be heeded but some authorities seem to be anxious to vie with others in providing what may be described as really palatial homes and are sometimes furnished in a style which many of the ratepayers cannot afford for themselves.

It is becoming clear that old people admitted to Part III accommodation under the National Assistance Act are older and definitely more infirm than those admitted previously. Some local authorities press the need for making provision in some of these homes for infirm people who do not definitely require hospital care. It is suggested in the report of the chief medical officer that there would appear to be a case for this type of accommodation to provide for temporary care similar to that already provided by the hospital. This sort of care would enable the old person living alone, or perhaps with younger relatives to be admitted to such a home for a short period during which he would derive great benefit from the care and attention, but it would also enable the relatives to enjoy a period in which they are free of this responsibility.

The proportion of men and women of pensionable age is one in seven of the population. Ninety-seven *per cent.* of old people continue to live independent lives ; the remaining 3 *per cent.* occupy institutional accommodation. Many local authorities are now including special dwellings for old people in their building schemes but it is suggested in the report of the chief medical officer that the proportion could possibly be increased.

Voluntary Activities

The manner in which local residents and voluntary bodies help to make happy the lives of the residents in these homes is commended and it is noted that in some areas " the home has taken its own place in the community and reciprocated interest by providing a centre for whist drives or other social occasions and by being ' at home ' to the local inhabitants from time to time." Occasionally provision has been made whereby residents have a room available in which they can receive and entertain their visitors. Another matter which is considered in the report is the increasing interest in providing diversional occupations for the residents, such as handicrafts. Often thereby money is raised to provide a fund for additional amenities such as outings. As to the type of accommodation needed for old people it is noted that more emphasis must be placed on the importance of ground-floor accommodation and other facilities " for the care of the very infirm in the higher age ranges," and that in determining the nature of future developments " local authorities are bound to give weight to the changing nature of the needs of the residents." On the difficulty of staffing new homes suitably the report commends the training courses run by the National Old People's Welfare Committee " as a fruitful field for recruiting senior staff " and also commends the short refresher courses for matrons and wardens provided by this committee. It is also noted that " with the increase in the age and infirmity of residents, local authorities find a growing need to utilize the home nursing service or to employ staff with some nursing training or experience."

This section of the report also considers in detail the welfare services provided for the blind and other handicapped persons. Finally, reference is made to the increasing need to provide for the welfare of old people in their own homes and mention is made of the work done in this connexion by the 56 county old people's welfare committees and the 1,050 local committees which have been established through the work of the National Old People's Welfare Committee. It is recognized that the organization of these voluntary services is less easy in the more rural areas, where, however, in the opinion of the Ministry there is an equal need for the service. Some county committees are known to be giving attention to the best ways of promoting services in such areas.

Special mention is made of the need for extending the friendly visiting services organized by old people's welfare committees as also other services, such as clubs of which there are now over 3,500. Some local authorities have made special grants to these committees for the organization of a visiting service. Other services provided by voluntary organizations are also mentioned such as chiropody, laundry, night-watchers ; and a further development of interest is the increasing part being played by members of youth organizations in carrying out such services as shopping, changing of library books, etc. " Their useful and often enthusiastic point of view is much appreciated by the old people." Reference is also made in the report of the chief medical officer to the work which local committees are doing. It is suggested that a particular need for those who are bedfast or suffering from acute illness for which the hospital service is not available is a laundry scheme by which soiled linen can be washed and replaced by clean linen. In one county borough there is a bi-weekly laundry service for such persons and because of the poor state of the soiled linen the council lends bed linen for suitable cases. Another county borough has a similar service in which soiled bed linen is collected and brought to a central laundry where it is disinfected and then laundered. The local authority lends sheets and night gowns and has already provided a bi-weekly service for 1,000 old people.

ADDITIONS TO COMMISSIONS

KEIGHLEY BOROUGH

Norman Bancroft, Royd House, Oxenhope, Keighley.
Cecil Wilkinson Fearnside, Blakesmore, Bogthorn, Oaksworth, Keighley.

MONMOUTH COUNTY

Graham Reginald Beeston, Avilion, Machen.
Mrs. Florence Jane Brown, 9, Gray Street, Abertillery.
Mrs. Christina Mary Davies, 15, The Uplands, Rogerstone.
Miss Pauline Mary England, Amberley Court, Monmouth.
Mrs. Gladys Jane Fleming, Star Villa, Llantarnam Road, Llantarnam.
Ernest Charles Hutchins, 117, Elgam Avenue, Blaenavon.
Mrs. Ruth May James, Nantgoch, Tre Thomas.
Ernest Charles Jordan, Glen Plas, Caerleon.
Percival Morley Lewis, Ivy House, Risca.
Miss Sarah Mary Winifred Leyshon, Victoria Buildings, Elliotstown, New Tredegar.
Lt.-Col. Henry Morton Llewellyn, C.B.E., Gobion Manor, nr. Abergavenny.
Mrs. Clemence Penelope Olga Micklethwait, Penhein, Llanvair Discoed.
Lady Marjorie Leighton Seager, Marleigh Lodge, St. Mellons.
Vernon Stuart Shuttleworth, Springfield, Grosmont.
Lt.-Col. Hugh William Tyler, Beacon Cottage, Trelech.
Kenneth George Gwynne Weekes, Langstone Court, Langstone.
Frank Idris Whatley, 5, Hillside Terrace, Waunllwyd.
The Hon. Mrs. Elsie MacDonald Williams, Hafod-y-Cwm, Pant Road, Newbridge.

WEEKLY NOTES OF CASES

COURT OF CRIMINAL APPEAL

(Before Lord Goddard, C.J., Cassels and Sellers, JJ.)

R. *v.* WILSON

January 12, 1955

Criminal Law—Indictment—Assault with intent to resist arrest—Power to convict of common assault—Offences against the Person Act, 1861 (24 *and* 25 *Vict., c.* 100), *s.* 38.

APPEAL against conviction, and APPLICATION for leave to appeal against sentence.

The appellant was charged at Newark quarter sessions with assault with intent to prevent lawful apprehension, contrary to s. 38 of the Offences against the Person Act, 1861. The person who was alleged to have been assaulted was a gamekeeper who found the appellant poaching in the daytime. By s. 31 of the Game Act, 1831, in the circumstances of the present case the gamekeeper was obliged, first, to ask the person whom he was intending to arrest his Christian name, surname, and usual place of abode and the arrest became lawful only if the information were refused. The gamekeeper, in his evidence, said that he had asked the appellant for his name only. At the close of the case for the prosecution a submission was made by the defence that there was no case to answer as the intended arrest was not a lawful one. The court ruled that the appellant could not be convicted of the offence charged in the indictment, but the chairman directed the jury that on that indictment it was open to them to convict of common assault if they were satisfied that the appellant had used a greater degree of force than that required to effect his escape. The jury convicted the appellant, and he was sentenced to nine months' imprisonment. The chairman gave a certificate for appeal on the question whether a verdict of common assault was open to the jury on the evidence.

Held, that the ruling of the chairman was correct, as the offence of which the appellant was found guilty was a lesser offence of the same quality as that charged in the indictment, *i.e.*, an assault without the circumstances of aggravation involved in the offence charged.

Counsel: *Peter Bruce*, for the appellant; *A. Ellis* for the Crown.

Solicitors: *Registrar*, Court of Criminal Appeal; *Hibbert & Son*, Mansfield.

(Reported by T. R. Fitzwalter Butler, Esq., Barrister-at-Law.)

QUEEN'S BENCH DIVISION

(Before Lord Goddard, C.J., Cassels and Streatfeild, JJ.)

McINNES *v.* CLARKE

January 19, 1955

Accommodation Agency—Deposit paid before list of addresses supplied—Undertaking to return deposit if client not accommodated—Accommodation Agencies Act, 1953 (1 *and* 2 *Eliz.* 2, *c.* 23), *s.* 1 (1) (*b*).

CASE STATED by a metropolitan magistrate.

Informations were preferred at West London magistrate's court by the respondent, Clarke, charging the appellant, Douglas George McInnes, an estate agent, with, in one case, accepting a cheque for £3, and, in another case, demanding £4, in consideration of supplying or undertaking to supply addresses or other particulars of houses to let, contrary to s. 1 (1) (*b*) of the Accommodation Agencies Act, 1953.

The magistrate found that the appellant carried on the business of an estate agent in the firm name of Douglas West, and his business was that of finding furnished accommodation. On a person making an inquiry for accommodation, he would be asked his requirements and what rent he was willing to pay. He would then be told that the fee payable by him, if accommodated, was a sum equal to one week's rent of the premises taken by him and that a deposit of approximately half of the weekly rental which he was willing to pay would be asked for. In the event of the client being willing to pay the deposit an agreement would be entered into and signed by the client and the firm. Sometimes before and sometimes after the agreement was signed a list of addresses would be given to the client. After the client had obtained accommodation he would return and pay the balance of the fee due. Unsatisfied clients who had asked for a return of their deposit had received it back in full. The magistrate further found that the appellant was carrying on an honest business. The magistrate convicted the appellant, who appealed.

Section 1 (1) of the Act of 1953 provides that, subject to the provisions of the section, "any person who . . . (*b*) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let; . . . shall be guilty of an offence."

Held, that the wording of the contracts could only be regarded as an attempted evasion of the Act, the real consideration clearly being the supply of addresses of accommodation, which was the mischief aimed at by the Act, and the fact that the appellant undertook to return the deposit if the client were not accommodated made no difference. The magistrate had, therefore, come to a right decision, and the appeal must be dismissed.

Counsel: *Melford Stevenson, Q.C.*, and *Roger Willis*, for the appellant; *Phipps*, for the respondent.

Solicitors: *Willis & Willis*; *Director of Public Prosecutions*.

(Reported by T. R. Fitzwalter Butler, Esq., Barrister-at-Law.)

BAXTER *v.* KELDON

January 18, 1955

Gaming and Wagering—Money and betting slips accepted by bookmaker's "runner"—Charge of assisting in conducting business of place used for receiving bets—Offence laid under wrong section—Betting Act, 1853 (16 *and* 17 *Vict., c.* 119), *s.* 3, *s.* 4.

CASE STATED by a metropolitan magistrate.

An information was preferred at Lambeth magistrate's court by the appellant, Baxter, a police officer, charging the respondent, Peter Keldon, with, between October 14 and 29, 1953, assisting in conducting the business of a place at 354 Kennington Road, S.E., used by one Thomas Brindle for receiving bets, contrary to s. 3 of the Betting Act, 1853.

The magistrate found that during the relevant period Brindle, a brother-in-law of the respondent, was conducting a betting business at 354 Kennington Road. Money and betting slips were accepted on his behalf by his agents (including the respondent) at a number of pitches in the streets, brought to the office, and there sorted and recorded. The respondent never took any part in the work done in the office.

It was contended for the respondent that in accepting money and betting slips on behalf of Brindle he had offended against s. 4 of the Betting Act, 1853, but not against s. 3. The magistrate was of the opinion that this contention was right, and he dismissed the information. The appellant appealed.

Held, that the magistrate's decision was right, as s. 3 and s. 4 of the Act created distinct offences punishable with different penalties, and where a statute created a substantive offence consisting in the doing of a certain thing, and a person did that thing, he must be prosecuted for that offence and not for another carrying a more severe penalty. The appeal must, therefore, be dismissed.

Counsel: *Cassel* and *E. J. P. Cussen*, for the appellant; *Griffith-Jones*, for the respondent.

Solicitors: *Solicitor*, Metropolitan Police; *Henry I. Sydney & Co.*

(Reported by T. R. Fitzwalter Butler, Esq., Barrister-at-Law.)

(Before Lord Goddard, C.J., Cassels and Lynskey, JJ.)

BURSTED PROPERTIES, LTD. *v.* DENTON U.D.C.

January 14, 1955

Public Health—Building—Paved and drained passage—"Passage giving access to a house"—Front garden path—Public Health Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 49), *s.* 56 (1).

CASE STATED by the appeal committee of Lancashire quarter sessions.

Denton urban district council served on Bursted Properties, Ltd., who were the owners of certain houses within their area, notices under s. 56 (1) of the Public Health Act, 1936, requiring them to flag, asphalt, or pave certain enclosures in the nature of front garden paths between the public highway and the front doors of the houses. The owners appealed under s. 290 (3) of the Act to a court of summary jurisdiction, which held that the enclosures were "passages" within the meaning of s. 56 (1) of the Act, and that the notices were, accordingly, valid. Section 56 (1) provides: "If any court or yard appurtenant to, or any passage giving access to, a house is not so formed, flagged, asphalted, or paved, or is not provided with such works on, above, or below its surface as to allow of the satisfactory drainage of its surface or subsoil to a proper outfall, the local authority may by notice require the owner of the house to execute all such works as may be necessary to remedy the defect." The owners appealed to quarter sessions, who held that the enclosures were not "passages" within the meaning of the subsection and that the owners were, therefore, not liable to comply with the notice. The council appealed to the Divisional Court.

Held, that the subsection aimed at a passage in the nature of a court and did not include a path of the kind under consideration, and, therefore, the decision of quarter sessions was right, and the appeal must be dismissed.

Counsel: *Hodgson*, for the council; *Solley*, for the owners.

Solicitors: *Sharpe, Pritchard & Co.* for *James Smith*, clerk to the Denton U.D.C.; *Capel Cure & Clarke*.

(Reported by T. R. Fitzwalter Butler, Esq., Barrister-at-Law.)

LAW AND PENALTIES IN MAGISTERIAL AND OTHER COURTS

No. 9.

A POSTMAN'S LAPSE

A 29 year old man, who had been employed as a postman for six weeks at the time he committed the offences, appeared at Nuneaton magistrates' court on January 3 last charged, first, with destroying 200 postal packets in the course of transmission when an officer of the Post Office contrary to s. 57 of the Post Office Act, 1953, and secondly, when an officer of the Post Office, with wilfully delaying 326 postal packets in the course of transmission by post contrary to s. 58 of the Act.

The defendant consented to be dealt with summarily and pleaded guilty to each of the charges.

For the prosecution, it was stated that the defendant had taken back to his lodgings a large number of letters which had been sent out by a company to various addresses in the town. The letters contained gift vouchers inviting people to purchase packets of a detergent at less than the usual price. The defendant went to his landlady carrying a bundle of the letters and asked whether he could burn them on the fire. She told him that he could not, but the next day she found burnt paper in the hearth. Investigating officers found 326 packets in defendant's room and some 200 had been burnt.

In a statement made by defendant he said that he had taken the letters to his lodgings because some of them had come loose in his bag and he was afraid to return them to the Post Office for re-sorting. There was no evidence that defendant had attempted to sell or dispose of the coupons.

Defendant, an unmarried man, of hitherto good character, was fined £5 in respect of each charge.

COMMENT

Although crime can never be wholly condoned the writer thinks that most readers will regard it as a mitigating factor that the accused limited his wrongful actions to postal packets relating to detergents. The whole country has been flooded for far too long with offers and counter offers from the various concerns interested in the sale of detergents, and one can feel a sneaking sympathy for the postman who finds that his bag is weighed down with literature of this nature.

It is odd that offences of this nature can be dealt with in a magistrates' court for it will be remembered that by s. 57 an officer of the Post Office who destroys a postal packet containing any chattel, money or valuable security, may be imprisoned for life if the case goes to trial.

It is, of course, by virtue of s. 19 of the Magistrates' Courts Act, 1952, that offences of this nature may be tried summarily provided the prosecutor and accused are willing. Subsection (6) of this section has the effect of reducing the maximum penalty, where the accused is dealt with summarily, from imprisonment for life to imprisonment for six months and a fine of £100.

The rather pompous phrase " officer of the Post Office " employed in ss. 57 and 58 of the Act is defined in s. 87 as including the Postmaster-General and any person employed in any business of the Post Office, whether employed by the Postmaster-General or by any person under him or on behalf of the Post Office.

(The writer is greatly indebted to Mr. G. S. Gibbons, clerk to the Nuneaton justices, for information in regard to this case.) R.L.H.

No. 10.

A NON-RESIDENT LICENSEE IN TROUBLE

The licensee of a Newcastle public house was charged recently at the local magistrates' court with supplying by the hands of a servant intoxicating liquor in licensed premises during other than permitted hours, contrary to s. 100 of the Licensing Act, 1953. The manageress was charged under the same section with supplying the liquor and two men were charged with consuming the liquor contrary to the same section.

For the prosecution it was stated that the licensee, a man of 81, who lived in Alloa, Scotland, was not upon the premises when police officers visited it on receipt of a message. The two men charged with consuming were friends of members of the family of the manageress and had accompanied them when on a visit to the house. The party had been upstairs in the manageress' quarters watching television, and before the two men left the manageress quite openly offered them a drink at about 11.20 *p.m.*

All the defendants pleaded guilty to the charges preferred and the court was asked by the defence to treat the case as one of a merely technical offence.

The licensee was fined £20, the manageress £5, and the two consumers £2 each. According to the newspaper report in the writer's possession the chairman said that the licensing justices felt strongly that licensees should live on the premises.

COMMENT

This case emphasizes two matters of interest—the one a matter of law, the other a matter of practice.

It will be recalled that s. 100 of the Act provides that no person shall, except during permitted hours, either himself or by a servant or agent, sell or supply intoxicating liquor to any person in licensed premises, nor may anyone consume intoxicating liquor in such circumstances. Subsection (2) of the section contains the exceptions to this rule, one of which is the well-known provision that the licensee may entertain his *bona fide* friends outside permitted hours by supplying to them intoxicating liquor. It is important to realize that although the licensee has this privilege it does not extend to his manager, although to all intents and purposes, as in this case, the manager carries out the role intended by Parliament to be performed by the licensee.

Difficulties of the nature referred to above will always tend to occur where the person in actual charge of a house is not entrusted with the licence, and this brings the writer to his second point.

The chairman in this case is reported to have said that the licensing committee felt strongly that the licensee should live on the premises. Anyone who is concerned with the running of licensed houses knows that unsatisfactory situations constantly arise where, in the case of on-licensed premises, the licensee does not reside on the premises, and in many divisions in the south of the country the licensing justices insist that the licensee shall reside upon the premises in all cases where there is accommodation for him. In the case of premises owned by brewery companies and put by them under management, the company's interests are safeguarded by the licence being held by the secretary of the company jointly with the resident manager.

Unless the resident manager is joined in the holding of the licence the licensing justices are always faced with an unsatisfactory position when they have to consider the question of the renewal of the licence to a convicted licence holder. The licensee, as in the case reported above, can say with perfect truth that he was miles away from the premises when the offence was committed; that he had given strict instructions that the licensing laws were to be duly observed and that he regrets that he had been let down, etc., etc. The remedy surely, is to have upon the premises a licensee who is responsible to the licensing justices for the proper conduct of the premises, and who can be punished by a refusal to renew the justices' licence to him in cases where he has failed to observe the high standard required of him.

R.L.H.

PENALTIES

Clitheroe—December, 1954. Conveying sheep in a manner causing unnecessary suffering. Fined £5.

Clitheroe—December, 1954. Causing unnecessary suffering to sheep Fined £25.

Clitheroe—December, 1954. Permitting unnecessary suffering to sheep. Fined £25. A wagon containing 215 sheep which had been conveyed from Aberdeen to Clitheroe was opened and four dead sheep fell out. Two more were dying and another four had to be slaughtered because of their condition. A veterinary surgeon said that the wagon should not have carried more than 135-150 sheep.

Bristol—December, 1954. Selling goods from a shop when the shop should have been closed (three charges). Failing to display prominently compulsory notices concerning trade on Sundays and half-days. Fined a total of £6 and to pay £2 2*s.* costs.

Hereford—December, 1954. Failing to exhibit two red reflectors on the rear of a car. Fined £5. The first case of its type in Herefordshire.

Kendal—December, 1954. Stealing 13 hens and one turkey. Two defendants each fined £50, and to pay £10 restitution.

Kendal—December, 1954. Receiving 10 of the hens and the turkey. Fined £20. One of the thieves asked for two other cases of poultry theft to be taken into consideration.

PARLIAMENTARY INTELLIGENCE

Progress of Bills

HOUSE OF LORDS

Tuesday, January 25

CHILDREN AND YOUNG PERSONS (AMENDMENT) BILL, read 1a.

HOUSE OF COMMONS

NEW TOWNS BILL, read 3a.

MISCELLANEOUS INFORMATION

THE "ENTERTAINMENT" CLAUSE

A discussion conference convened by the London Council of Social Services recently was devoted to the functions of local authorities in fostering the arts and providing entertainment under s. 132 of the Local Government Act, 1948.

The proceedings took the form of a debate on a motion proposed by Mr. John Connell, of the *Evening News*, to the effect that local authorities had not fully understood the opportunities provided by this clause. In the event, no positive conclusion was reached on the proposition which Mr. Connell advanced because he and the rest of the company were too often talking on different themes. Mr. Connell spoke as an advocate of public patronage of the arts. Most of the subsequent speakers described the varied assortment of activities in which their respective authorities engaged under the Act—some of which indeed came under the heading of arts but many of which fell into the category of popular entertainment which comprised only a small artistic element if any at all. Despite this flaw in the logical effectiveness of the occasion it justified itself nevertheless by the copious flow of information exchanged by the various speakers and, it is reasonable to assume, by the stimulation which it furnished to expand the range of work in these fields.

Mr. Connell opened by deploring that s. 132 was permissive and not mandatory: it seemed that our legislators regarded fostering the arts as less essential than providing sewers or lighting streets. Because it was permissive, local councillors might logically maintain that, though they fully realized their powers, they preferred not to exercise them; that, he believed, was not the situation. Authorities were not unwilling to use their powers but they really "did not cotton on to what it was all about."

The relatively minor response to the Act was shown, Mr. Connell maintained, by the survey made by the London Council of Social Service two years ago when out of 90 authorities only 64 promoted municipal entertainment and the 46 who revealed their expenditure devoted no more than £80,000 a year in total to this end.

The problem of fostering the arts at this stage of our history could be understood only by looking back. It stemmed from the Industrial Revolution and the division of the community into "two nations"; apart from a few popular arts like the music hall or the decoration of public houses the rest became a middle-class preserve. Today, middle-class predominance had gone and with it the zest and indeed the ability for leadership; one aspect of that leadership had been the desire to foster the arts and its loss provided the reason why some other body must be found to accept this responsibility. Mr. Connell went on to assert the vital role of art in civilized life. It was as fundamental, he believed, as love or worship or prayer; it was one of the means whereby the individual deepened his own experience through communion with something bigger. There existed a deep, thwarted desire to comprehend art; it was similar to the longing of a child for a key to a garden from which he was shut out but of which he felt himself to be an inheritor.

The need to replace the former patrons of the arts could not be met all at once, but the framers of the 1948 Act thought they had devised a key to let a few inheritors into the garden. Local authority encouragement and support of art and culture was obviously one very practical way of unlocking the door.

Our representatives on public bodies, Mr. Connell went on, are very like the rest of us both in their limitations and in their grandeurs. He illustrated what he regarded as the bewilderment of some councillors in matters of art by the story of a St. Pancras borough councillor who objected to the refurbishing of the grave of Johann Christian Bach because he was a German, a member of a race with whom the councillor had recently been at war. Yet this same councillor was an enthusiast in another branch of art: one door to the garden was open for him but that to music was closed.

Mr. Connell appealed to writers and artists and all who cared for the preservation of artistic life to "take their coats off and get into the battle of local affairs." It meant hard work and heartache, but they must get down to persuading Alderman Grocer and Councillor Platelayer that the arts were worth while.

Alderman A. E. Cotton gave an account of what the Lambeth borough council had done in the realm of general public relations and in the support of the artistic life in the borough. They worked, he said, mainly through the Civic Society which included voluntary bodies and individuals besides council representatives and was divided into sections for drama, films, music, and other activities. Mr. Cotton did not agree that local authorities did not understand the opportunities before them: their only bewilderment arose when they had to choose, in the face of conflicting claims, how best to spend their money—a launderette or a Picasso, pedestrian crossings or a library.

Councillor D. R. P. Murray described the work of Hammersmith borough council and denied Mr. Connell's allegation that local authorities did not fully understand their powers. The main difficulty was financial and Mr. Connell had glossed over this: every councillor lived in dread of the old *cliché* "a disgraceful waste of public money." As an influential journalist Mr. Connell should cease to highlight "squandermania" and persuade the public to change their attitude.

Miss R. E. Seaton (Islington borough council) emphasized the importance of matching the council's activities to the tastes of their citizens; it was of no use providing symphony concerts in an empty town hall. The Islington Civic Society included in its activities shows of caged birds, poultry, rabbits, and the like, which were not artistic but, in her view, expressed the communal personality of Islington.

The contribution which professional artists should make to the work of local authorities was outlined by Mr. Gordon Sandison (British Equity) and by a speaker from the Musicians' Union. These organizations were both busy advising local authorities on the presentation of plays or concerts. Both speakers denied any antagonism between professionals and amateurs, both of whom had their own part to play in creating a virile artistic life. Miss M. J. Richards (Friern Barnet urban district council) illustrated this by saying that her authority met the cost of the professional singers for the leading roles in the *Messiah* when it was sung by an amateur choir, or of the professional adjudicators in a drama contest.

Commenting on the prolonged and vigorous discussion, Mr. Connell said it revealed a widespread desire for more diversified local effort. It was up to all of those who were enthusiasts for the arts to make their influence suffuse both the elected councillors and all their neighbours around them.

SHEFFIELD FINANCIAL SURVEY, 1953/54

Sheffield city treasurer, Mr. F. G. Jones, F.I.M.T.A., has arranged most of his annual survey in alphabetical order under service heads. It is a method of considerable advantage for council members and public: we are pleased to note that a number of authorities are now adopting this manner of presentation.

Sheffield is, of course, one of the great towns. It has a population of 508,000 and 172,000 rateable properties (of which 150,000 are houses) having a rateable value of £3,530,000, equivalent to £6 19*s.* per head—too high to qualify for any exchequer equalization grant. The city council employ 18,300 workers full-time and 3,500 part-time: water and transport are supplied and a market is provided in addition to all the usual services.

Total revenue expenditure in 1953/54 was £17,100,000: balancing income was provided half by charges made for rents and services, and the remaining half by rates and grants in almost equal proportions. Housing rents at £1,740,000 provided one of the major items of income and it is a sobering thought that nearly one-quarter of the total number of houses in Sheffield have been built by the corporation under the Housing Acts. The actual number is 40,851. Ratepayers and taxpayers subsidized the tenants to the extent of £590,000 during the year and in addition there was a deficiency on the housing revenue account of £67,000 (although this may have been swollen by the non-statutory net debits to the account). The ratepayers' bill for the year was a 1*s.* 2*d.* rate.

With the exception of the civic restaurants (loss £4,000) all trading departments had a successful year. The water undertaking produced a surplus of £16,000, transport £44,000 (trams lost £26,000 but the buses saved the situation with a profit of £70,000), and markets and abattoir (including by-products plant) £10,000 each. Incidentally, it is of interest that the Sheffield Water Company was bought out for £2,000,000 in 1888, having incurred the opposition of the city council when seeking to make permanent a temporary increase in revenues.

The city council administer a successful insurance fund, first established in 1908 as a workmen's compensation fund, but now covering employers' liability, fidelity guarantee, fire, motor and third party. The fund has now a balance in excess of £400,000 and therefore as directed by the local Act of Parliament income from investments is apportioned between contributing departments. In relation to present day costs the amount of the fund is not at all large and we wonder whether any adjustment of the controlling figure has been made to allow for the depreciation of money since the figure was first fixed.

The balance sheet is a model. It shows clearly and in fashion easily understandable by the layman that the corporation has net assets of £30,600,000 and that these are divided into capital assets of £25,000,000, superannuation, reserves and the like £5,000,000 and revenue balances of £600,000.

BEYOND REASON

The law must at times appear to the layman a perverse institution. The empirical method by which our legal system was built involves in its application a degree of flexibility denied to the Continental Codes; it enables our law to adapt itself to varying circumstances but at the same time makes it seem sometimes arbitrary and inconsistent. Cynics have joked about the Reasonable Man—that elusive being, whose principal pursuits, here, are riding on the Clapham omnibus, and, across the Atlantic, pushing the lawn-mower in his shirt-sleeves and taking the weekly magazines. It should not be long before some progressive judge brings these definitions up to date and observes in the Reasonable Man a persistent devotion to television, the light programme and the football-pools.

"Reasonable" is, incidentally, the last adjective we should apply to him, taking the word in its literal significance; in most of life's activities he is guided by his heart rather than his head, which is as full of taboos and superstitions as that of a Bushman. Why he should be selected as the arbiter, for example, in questions of nuisance (about which, if asked, he would not have the glimmer of an idea), but have all his opinions rudely ignored in those matrimonial difficulties of which he has practical experience, is an inscrutable mystery.

It is not the least among the illogicalities of our system that, while public policy remains a question of law for the decision of the judge, public opinion is taken to mean the opinion of the most emotional and least intelligent section of the public. The absurdities to which this has given rise are illustrated in the recent cases on obscene publications, to which this Journal has paid close attention. The state of near-hysteria into which the Englishman works himself when matters relating to sex are discussed is no doubt the result of psychological conflict—a conflict between the natural human urges and the indigenous repressions born of our repulsive climate. Puritanism, after all, is a regional phenomenon, confined almost entirely to England, Scotland, Holland, Scandinavia and Northern Germany—a region bounded on the south by the 50th parallel of latitude. Wherever it is found elsewhere—in the United States, South Africa and Australasia—it is among people of the same national stocks as those that inhabit Northern Europe.

The Reasonable Man is concerned, not so much with what people say and do as with where they say and do it. Attire, or the lack of it, which is tolerated on the beach or in the life-class, rouses conventional people to frenzy in the market-place; conduct, words and gestures which are the stock-in-trade of the cinema and the variety-theatre are anathema in the streets and public buildings. There is, it may be admitted, a grain of commonsense and a modicum of good taste in the Englishman's abhorrence of exhibitionism in real life; but he gets a vicarious thrill from its entertainment value in his off-hours. Here, again, there is no consistency. Intimacies which are regarded as commendable in the privacy of the matrimonial home—the persistent refusal of which, indeed, may be evidence of "cruelty"—are frowned upon elsewhere; their detailed discussion which, before the justices, is carried on behind closed doors, is attended in the Divorce Division of the High Court with full publicity. There is neither rhyme nor reason in these vagaries; they first astound and then disgust foreign observers, who ultimately dismiss them with a shrug as further evidence of the English vice of hypocrisy.

In a recent case before the Durham magistrates (reported *ante*, p. 10), a couple were prosecuted for "behaving in a disorderly manner" on an omnibus, contrary to the Public Service Vehicles (Conduct of Drivers, Conductors and Passengers) Regulations, 1936. They were "the worse for drink"—a specious expression which bears the unfounded implication that they would necessarily have been the better without it. Having experienced some difficulty in seating themselves on the top deck of the vehicle, they burst into song, to the alarm and despondency of the Reasonable Men and Women who travelled with them. These vocal preliminaries (as is not uncommon in feline circles) were but the overture to amatory exercise: the male defendant proceeded to kiss and embrace his companion, pressed his body upon hers, and behaved in a manner which outraged their fellow-passengers and the conductor. They were requested to leave the bus, but took no notice of any protest.

As our law-tutor used to remark, it is always difficult to say where courtship ends and indecent assault begins. At any rate, there came a point where, to the eye of the observer, jocosity turned to bellicosity, and concord to discord, and then—

> "Heav'n has no rage like love to hatred turn'd,
> Nor Hell a fury like a woman scorn'd."

The lady, tiring of her swain's attentions, ceased to be kittenish and began to "imitate the action of the tiger." Satiety led to remonstrance, and remonstrance to aggressive violence. Seizing his walking-stick, she "set about him with such vigour" that the driver drove the bus to the nearest police-station, where the defendants were persuaded to descend to earth and were duly charged.

The sequel shows once again that appearances may be deceptive, and that love-play takes curious forms. By the time the case came before the court, a marriage had taken place, and aggressor and victim were man and wife. This sentimental conclusion to the story did little to mitigate the severity of the bench, who fined both defendants £5 with £4 10*s.* costs. Self-expression is, up to a point, an excellent thing, and personal idiosyncrasy in the demonstration of affection must, subjectively speaking, receive due licence and allowance. Doubtless this strangely-assorted pair, emerging unscathed from their ordeal, will walk hand-in-hand down the long years ahead in blissful union, strengthened all the more by an occasional lovers' tiff in which a beating-up, on one side or the other, will take its proper place. That, for the moment, will be their own private affair—unless and until continued cohabitation becomes intolerable and mayhem or murder is committed, when it will become a matter of public importance. Meanwhile, unrestrained billing and cooing has been driven from the light of day; disorderly conduct has been repressed, public decency vindicated; and the Reasonable Man on the omnibus has come into his own.

A.L.P.

THE WEEK IN PARLIAMENT

From Our Lobby Correspondent

Parliament has reassembled after the Christmas recess and M.P.s are expecting the remainder of the session to be busy and controversial, with the possibility of it being interrupted at almost any time by a general election.

One of the most controversial, though non-party, items will be a debate on capital punishment which the Government have promised and which is expected to take place shortly. In the course of this, the Government are expected to make known their views on the recommendations of the recent Royal Commission.

Legislation to deal with horror comics is expected to be introduced by the Home Secretary, although he said last week that he had nothing yet to add to his previous statements on the subject.

Among private members' activities, Mr. E. H. C. Leather (Somerset N.) is to seek permission of the House under the Ten-Minute Rule on Tuesday, February 8, to introduce a Bill to amend the Justices of the Peace Act, 1361.

PRACTICAL POINTS

All questions for consideration should be addressed to "The Publishers of the Justice of the Peace and Local Government Review, Little London, Chichester, Sussex." The questions of yearly and half-yearly subscribers only are answerable in the Journal. The name and address of the subscriber must accompany each communication. All communications must be typewritten or written on one side of the paper only, and should be in duplicate.

1.—Adoption—*Parents of infant divorced, husband being given right of access—Effect of adoption order.*

A man and his wife applied to a magistrates' court to adopt a child. The child was the son of the female applicant, who had divorced her first husband on the ground of his adultery. The divorce court, when making the decree in favour of the wife, granted the husband access to the child at all reasonable times.

The female applicant later married the male applicant.

Is the father of the child still entitled to exercise the right conferred upon him by the divorce court to have access to the child at all reasonable times?

It is appreciated that s. 10 of the Adoption Act, 1950, states that "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock. It is also appreciated that the father, when signing the form of consent to the adoption order, signed a statement to the effect that "I understand that the effect of an adoption order is to deprive a parent or guardian of all rights in respect of the maintenance and upbringing of the infant."

Does, however, the expression "all rights in respect of the maintenance and upbringing of the infant" include the right to see the child previously granted by the divorce court? I am inclined to think that it does, and that the adoption order puts an end to the right of access. It seems to me that my point of view is strengthened by the fact that an adoption can be kept secret by the use of a serial number. Thus the father of the child would not know, in a serial number adoption, who had adopted the child, so that it would be quite impracticable for him to exercise his right of access.

I should be grateful if you would confirm that you concur with the opinion I have stated. SARD.

Answer.

We agree. The mother now has the custody of the infant, jointly with her husband, by virtue of the adoption order not by the decree of divorce, and we think the provision as to access is no longer in force. The case of *Crossley* v. *Crossley* [1953] 1 All E.R. 891; 117 J.P. 216, is in point.

2.—Bastardy—*Putative father desirous of obtaining custody of child—Mother still living.*

A is the putative father of an illegitimate child of which B is the mother, and an affiliation order has been made.

A wishes to obtain custody of the child and B is agreeable. In your opinion:

(*a*) Can A adopt the child or

(*b*) Can an order under the Guardianship of Infants Acts be made.

(*c*) If your answer to (*a*) and (*b*) is "Yes" it is presumed that the affiliation order should be discharged in respect of the child.

S. CAN.

Answer.

(*a*) As A is the father of the child (for the purposes of the Adoption Act, 1950, "Father" includes the natural father, s. 45) no question as to age arises under s. 2 of the Act. It is not stated whether the child is a boy or a girl, but if it is a girl the provisions of s. 2 (2) must not be overlooked. Subject to this A can adopt.

(*b*) The general opinion is that the Guardianship of Infants Acts do not apply to illegitimate children except when they must obviously refer to them. It is true that a contrary opinion is held in some quarters, and there appears to be no authority on the point. We think that in the absence of such authority justices should not assume jurisdiction.

(*c*) If an adoption order is made the affiliation order ceases to have effect, *see* s. 12.

3.—Husband and Wife—*Maintenance Orders (Facilities for Enforcement) Act, 1920—Variation of confirmed order—Extension of period of maintenance of child.*

(1) An order was made in South Africa in 1948 and, the defendant being within my borough, it was transmitted to and confirmed by my court later that year. The order was for the payment of a weekly amount in respect of a child of the marriage between the parties and it was to continue until the child attained the age of 15 years. Early this year the child did in fact attain this age and the order lapsed. Subsequently the mother, who is in South Africa, has requested that consideration be given to the possibility of further payments being obtained in order that the child may continue her education, and I have now been asked to consider whether an application can be entertained by my court to enable the payments to be continued for this purpose.

(2) The order was confirmed in my court under the terms of the Maintenance Orders (Facilities for Enforcement) Act, 1920, and by virtue of s. 6 (2) of that Act every such order is enforceable summarily as a civil debt provided that, if the order is of such a nature, that if it had been made by my court, it would be enforceable in like manner as an affiliation order, it shall be so enforceable.

(3) If the order had been made by my court can it be said to be of the nature either of a maintenance order or an order made under the Guardianship of Infants Acts and, if so would it be enforceable in like manner as an affiliation order?

(4) By s. 4 (6) of the 1920 Act the order confirmed by my court can be varied or rescinded as if it had originally been made by my court and on such an application, if my court is satisfied that it is necessary to remit the case to the South African court for the purpose of taking any further evidence, my court may so remit the case and adjourn the proceedings for that purpose.

(5) The next question is as to whether an application by the complainant for what amounts to a revival of an order which has lapsed owing to the child attaining the age of 15 years, can be properly treated as a variation of the order so as to fall within the terms of s. 4 (6) of the 1920 Act and enable my court to remit the case to South Africa for further evidence (by or on behalf of the complainant in support of her application).

(6) Reference to the decision in *Norman* v. *Norman* [1950] 1 All E.R. 1082; 114 J.P. 299, may be of assistance. In this case it was decided that application could be made for the payments required by an order to be continued even though the original order for maintenance of a child had expired.

(7) *Norman* v. *Norman* was decided in relation to the terms of s. 2 of the Married Women (Maintenance) Act, 1949, which are identical with those of s. 2 of the Guardianship and Maintenance of Infants Acts, 1951. In both these Acts subs. (1) of s. 2 begins: "The power of the court *to vary* an order . . . shall . . . include power *to vary* the order in accordance with the following provisions of this section." There then follows subs. (2) which gives the court power to continue payments after the child attains the age of 16 years. It would seem arguable therefore that such an application is for a variation but it must be borne in mind that it is for continuation of payments after the age of 16 years whereas the order now under consideration ceased at 15 years.

(8) I would also refer you to r. 34 of the Magistrates' Courts Rules, 1952, which refers to the revocation, discharge, *revival*, alteration or variation of an order enforceable as an affiliation order and to s. 53 of the Magistrates' Courts Act, 1952, which gives power to revive an order for periodical payment of money. This latter, however, relates only to an order made by a magistrates' court whereas in the present case the order was merely confirmed by my court.

(9) If it can be said that the present order is, by virtue of s. 6 (2) of the 1920 Act, an order enforceable summarily as a civil debt, then, under the terms of s. 45 (3) of the 1952 Act, would my court have power (providing it had jurisdiction) to make a fresh order (on complaint) with the consent of the defendant without hearing evidence?

I shall be glad if you will let me have your views in regard to the foregoing and in particular as to whether you consider my court would have jurisdiction under s. 44 of the 1952 Act to entertain an application, whether such an application would amount to a variation in respect of which my court could remit the case to South Africa for further evidence and, upon receipt of same, if so decided on the merits, whether my court could revive the original order and if so in what terms?

If you take the view that the order is enforceable as a civil debt, would it be competent for my court to make a new order on a complaint laid on behalf of the wife, with the consent of the husband, without hearing any evidence? SOLVO.

Answer.

The order is a maintenance order being an order for the maintenance of a dependant as defined in s. 10, and would be enforced as if it had been made under the Summary Jurisdiction (Separation and Maintenance) Acts or the Guardianship of Infants Acts in this country. It is

enforceable in the same manner as an affiliation order under s. 6 (2), so no question of civil debt procedure arises.

We think the extension would be a variation, because it is so described in the Acts of 1949 and 1951, but whether such a variation can be made by an English court, depends on South African law. It is clear from the cases of *Peagram* v. *Peagram* (1926) 90 J.P. 136, and *Harris* v. *Harris* [1949] 2 All E.R. 318 ; 113 J.P. 495, that such an order is made in accordance with the laws of the dominion in which the provisional order was made.

We think the first step is to ascertain under what South African statutes the provisional order was made, and what statutory powers exist which would enable such an extension to be made by a South African court. Evidence on this point, and evidence on behalf of the wife might be asked for under s. 4 (4).

4.—Land—*Right of drainage.*

My council has recently purchased a plot of land for housing development. A clause in the conveyance states that no ditches are conveyed. The land has a natural fall to a ditch, and drains into this ditch. Site works have been started and a piped drain has been laid for the purpose of street drainage and roof and yard rainwater washings to the ditch. The owner, although he has not objected to this drainage entering the ditch, has instructed his solicitors to demand from the council the following :

1. An easement for draining into the ditch ;
2. The acceptance by the council of full responsibility for cleansing the ditches once a year, and more often if necessary. These ditches are urgently in need of cleansing, as they have not had attention for many years past ;
3. A very large lump sum as compensation (amount not yet known), this amount to be fixed by his land agent and valuer.

Will you kindly give your opinion on items 1, 2 and 3. CHAME.

Answer.

In its natural state, the council's land had a natural right of drainage to the ditches, *i.e.*, no easement was required. This might have extended to an increased run-off due to normal use of the land, *e.g.*, paving and possibly building, even though this meant that roof water and pavement water flowed to the ditches instead of soaking into the earth. But this right does not cover canalizing the flow by a drain, so as to concentrate it. *Prima facie* therefore the council have no right to do this. But the owner of the ditches has asked (according to the query) for the opposite of what he wants ; *i.e.*, it is not he who is demanding an easement—he wants the council to apply for an easement.

So far, he is within his rights, since the discharge proposed by the council is not authorized by their ownership, standing alone, and may injure his property. But his 2 and 3 are on a different footing. To cleanse the ditches at the outset might be worth the council's while, because otherwise they may have to meet a claim for damage, and they can probably do it more economically than he can. But they should not undertake to do it year by year without advice as to the possible risk, and the true value of the easement. Still less should they put themselves into the hands of his valuer as in 3.

In short, 2 and 3 are a question of terms, and the council should resist. In the last resort, they might find it cheaper to buy the ditches compulsorily.

5.—Married Women—*Marriage to alien—Separation on husband's going abroad—Status and legal capacity of wife.*

An Englishwoman married a German in England in August, 1950. The husband goes back to Germany, and writes to his wife asking her to come to Germany to make a home there. She declines to do so, on the ground that when they were married he said he was not going back to Germany. There are no children of the marriage. The husband has now been in Germany since August, 1951, and his German solicitor writes stating that the husband is taking steps for a divorce. (1) What is the position of the wife ? Is a divorce granted in West Germany valid in England ? (2) Can the wife elect which nationality or domicile she can take ? (3) If the wife dies before a divorce is obtained will any will made by her in England be effective ? (4) Generally. SHANNON.

Answer.

We infer that the man's domicile is still in Germany, since the question speaks of his " going back," and making a home. Whether the wife's refusal to join him in that home is, by German law, desertion entitling him to a divorce, we do not know ; the German lawyer's letter suggests an affirmative answer.

On these assumptions :

(1) Yes.

(2) Her marriage did not do away with her British nationality—*see* the British Nationality Act, 1948. She may also possess German nationality, but does not now, presumably, wish to renounce her British birthright under s. 19.

(3) Yes.

(4) We have nothing to add, except that (of course) we do not know how far the law differs in Germany. But she probably owns no property there, so it seems immaterial.

6.—Slaughter-houses—*Sunday slaughter—Prohibition or control.*

Difficulty in meat inspection under the Public Health (Meat) Regulations, 1924, is being experienced as a result of the amount of Sunday killing carried out at slaughter-houses in this locality.

I shall be glad :

(i) Of your confirmation that this constitutes an offence against the Sunday Observance Act, 1627, and that action can be taken thereunder for what it is worth.

(ii) To know whether, in your opinion, this practice can be effectively controlled by the enforcing of the provisions of any other statutes, regulations or byelaws having ministerial approval. BARBORO.

Answer.

(i) We agree.

(ii) We do not know of anything. In face of the express statutory prohibition, we doubt whether special notices and the like could be required.

7.—Tort—*Injury to property when laying sewer—Remedy.*

A is the owner of a piece of land adjoining a county road which is about 18 feet wide. A stone wall is erected on the boundary of the land and on the same side is a pavement about three feet wide. The road normally has to carry heavy traffic, mainly lorries laden with stone from nearby quarries. The rural district council laid a sewer in the road. The work was done by a firm of contractors under an agreement with the council. To lay the sewer a trench was dug on the opposite side of the road to A's land. The trench was wide and deep and the excavated soil piled on the road made the road too narrow for vehicles to pass without mounting the pavement. While the trench was open much damage was done to the pavement and the curb stone through weight of traffic, and these had to be renewed. A consequence of the subsidence of the pavement and curb stone was damage to the foundations of A's wall, which is now leaning outwards and in a dangerous state. A wishes to be reimbursed the cost of repairing his wall. Can he successfully bring an action for damages against :

(*a*) The county council in whom the highway is vested ;
(*b*) The rural district council ;
(*c*) The contractors ;
(*d*) The various owners of lorries concerned (it is quite impossible at this stage to know whose lorries were in fact involved, so this point is perhaps academic). DEPPON.

Answer.

To take these in a different order. No, to (*d*), for the practical reason given and because the drivers might also have a good answer in law, upon these facts. No, to (*c*), unless it can be shown that they acted negligently. No, to (*a*), because, *prima facie*, they could not prevent the excavation. Coming, therefore, to the district council, the injured person's remedy is (it seems on these facts) not damages but compensation : *Lingké* v. *Christchurch Corporation* (1912) 76 J.P. 433 seems to establish his right to this.

8.—Water Act, 1945—*Security for cost of supply* (*sch. 3, part 10, s. 41*).

The council have recently agreed to lay certain water mains for the purpose of giving a water supply to farm land which is vested in a limited liability company and the cost of the work has been agreed, but the company does not desire to make payment in advance. The question of security arises. The cost of the work could be secured as a rent charge pursuant to the Land Improvement Act, 1864, and the District Councils (Water Supply Facilities) Act, 1897, but the sanction of the Minister of Agriculture and Fisheries would be required. The payments involved amount to the sum of £37 10*s. per annum*, over a period of ten years, and I shall be glad of your opinion as to whether the personal guarantee of two of the directors of the company would be sufficient security for payment, as required by s. 41 in part X of sch. 3 to the Water Act, 1945. PUNDIT.

Answer.

Yes, in our opinion. The section does not make any particular form of security obligatory. If the council are satisfied they can accept personal guarantees, or a mortgage of the land apart from the statutes cited, though the yearly amount here is so small that they may not think this worth while.

OFFICIAL AND CLASSIFIED ADVERTISEMENTS, ETC. *(Contd.)*

CITY OF PORTSMOUTH

Appointment of a Whole-time Female Probation Officer

APPLICATIONS are invited for the above appointment.

The appointment will be subject to the Probation Rules, 1949, as amended, and applicants must not be under the age of 23 or have attained the age of 40 years (except in the case of serving whole-time officers). The salary will be as provided by the Rules subject to deductions for superannuation. The successful applicant will be required to pass a medical examination.

Applications, upon a form which can be obtained from this office upon receipt of a stamped and addressed envelope, must be forwarded to reach me not later than February 19, 1955.

F. W. ANDREWS,
Secretary to the
Probation Committee.

17 and 18 Western Parade,
Portsmouth.

BOROUGH OF DAGENHAM

Appointment of Second Assistant Solicitor

APPLICATIONS are invited for the appointment of Second Assistant Solicitor in the Town Clerk's Department. Salary within the range £690 × £30—£900 per annum, plus London weighting (age 21 to 25, £20 per annum ; age 26 and over, £30 per annum).

This post offers an excellent opportunity for a Solicitor (or a Solicitor awaiting admission) to obtain wide experience of local government law and administration prior to advancing to the higher graded positions of the service.

Forms of application, together with further details of the post, obtainable from the undersigned. Closing date February 14, 1955.

KEITH LAUDER,
Town Clerk.

Civic Centre,
Dagenham.

DORSET COMBINED PROBATION AREA

Appointment of Full-Time Female Probation Officer

APPLICATIONS are invited for the above appointment in the Dorset Combined Probation Area.

The appointment will be subject to the Probation Rules, and the salary will be in accordance with these Rules, subject to the appropriate Superannuation deductions, plus a travelling allowance in accordance with the County Scale. The successful candidate will be required to pass a medical examination.

Forms of application and particulars of the appointment may be obtained from the undersigned, to whom applications should be returned not later than February 19, 1955, with the names and addresses of not more than three persons to whom reference may be made.

Canvassing, either directly or indirectly, will be a disqualification.

C. P. BRUTTON,
Secretary to the Probation Committee.

County Hall,
Dorchester.

BLYTH RURAL DISTRICT COUNCIL

SAXMUNDHAM URBAN DISTRICT COUNCIL

Appointment of Clerk

APPLICATIONS are invited for the combined appointment of Clerk of the above Councils. The conditions of service are in accordance with the recommendations of the Joint Negotiating Committee for Town Clerks and District Council Clerks. Salary, £1,307 10s. —£1,517 10s., according to qualifications and experience. Applications, giving additional particulars and the terms and conditions of appointment to be submitted on forms to be obtained from, and returned to the undersigned not later than Tuesday, February 15, 1955.

JOHN W. YALLOP,
Clerk to the Councils.

Council Offices,
Rendham Road, Saxmundham.
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SOUTHWELL RURAL DISTRICT COUNCIL

Appointment of Deputy Clerk and Chief Collector

APPLICATIONS are invited for the permanent appointment of Deputy Clerk and Chief Collector at a salary within Revised Scales Grade VII of the Administrative, Professional and Technical Division of the National Joint Council.

Candidates must possess a sound knowledge of and have had previous experience of the general duties of a Clerk's Department, and the successful applicant will be required to take responsibility under the direction of the Clerk to the Council.

The appointment will be subject to satisfactory medical examination by the Council's Medical Officer ; proof of age by production of birth certificate ; to the National Scheme of Conditions of Service as adopted by the Council ; to the provisions of the Local Government Superannuation Acts, and to one month's notice on either side.

The Council will give consideration to housing accommodation if required.

Forms of application, to be obtained from the undersigned, should be completed and returned, in sealed envelope, endorsed "Deputy Clerk," by not later than Friday, February 18, 1955.

Canvassing in any form will disqualify, and candidates must disclose whether, to their knowledge, they are related to any member of, or holder of any senior office under the Council.

S. W. LYNDS,
Clerk to the Council.

Council Offices,
Westgate, Southwell.

BOROUGH OF WATFORD

Assistant Solicitor

APPLICATIONS are invited for this post on new A.P.T. Grade VI/VII (£895—£1,100) depending upon qualifications and experience. The scale is at present under review.

Application forms and further particulars obtainable from me. Closing date February 17, 1955.

GORDON H. HALL,
Town Clerk.

Town Hall,
Watford.

HAYES AND HARLINGTON URBAN DISTRICT COUNCIL

Appointment of Assistant Solicitor

APPLICATIONS are invited for the appointment of an Assistant Solicitor at a salary within A.P.T. Division Grade V of the National Scales of Salaries, *i.e.*, £750—£900 per annum plus appropriate London " Weighting."

Candidates should have experience in conveyancing and advocacy.

Forms of application and further particulars and conditions of appointment may be obtained from the undersigned, to whom completed applications should be returned not later than Monday, February 14, 1955.

GEORGE HOOPER,
Clerk and Solicitor of the Council.

Town Hall,
Hayes, Middlesex.

HAMPSHIRE MAGISTRATES' COURTS COMMITTEE

Odiham Petty Sessional Division

APPLICATIONS are invited for the appointment of a male assistant in the Justices' Clerk's office at Aldershot. Previous experience in a justices' clerk's or private solicitor's office desirable. Applicants must be competent typists, shorthand desirable. The post is superannuable and present salary is according to age up to a maximum of £475 a year at 28 years.

Applications in own handwriting, stating age, qualifications and experience, with the names and addresses of three referees, to be sent to the Clerk to the Justices, 71 High Street, Aldershot, not later than February 19, 1955.

G. A. WHEATLEY,
Clerk of the Committee.

The Castle,
Winchester.

APPOINTMENTS

LONDON COUNTY COUNCIL invites SOLICITORS to apply for permanent and temporary appointments. Commencing salary £765 if admitted under one year, £796 17*s.* 6*d.* one year but less than two, £828 15*s.* two years or more, rising by £31 17*s.* 6d. to £892 10*s.* Superannuation scheme. Persons temporarily engaged eligible to apply for subsequent permanent vacancies. For details and application form (for return by February 21, 1955) send stamped addressed envelope to Solicitor ("Solicitor Assistant"), County Hall, S.E.1. (102).

BOROUGH OF SUTTON AND CHEAM

LEGAL CLERK required—salary within Grade A.P.T. III (£600 × 25—£725) according to experience, plus London "Weighting." Sound experience in Conveyancing and general legal work necessary.

The appointment is superannuable, is subject to the National Scheme of Conditions of Service and to a medical examination.

Applications, giving age, qualifications, experience, present and previous appointments and the names of two referees, must be received by the undersigned not later than Monday, February 21, 1955, in envelopes marked "Legal Clerk."

Canvassing in any form will be a disqualification, and every applicant must disclose whether he is related to any member or senior officer of the Council.

A. PRIESTLEY,
Town Clerk.

Municipal Offices,
Sutton, Surrey.
January, 1955.

COUNTY BOROUGH OF GLOUCESTER

ASSISTANT SOLICITOR required. Salary in accordance with current National Joint Council scale, commencing £690 or £780 dependent upon practical legal experience. Conveyancing essential. Applications by February 16, 1955, to Town Clerk, Guildhall, Gloucester, with references.

CITY OF BRADFORD

Justices' Clerk's Office

Appointment of Third Assistant

APPLICATIONS are invited for the appointment of Third Assistant in the office of the Clerk to the Justices for this City.

Applicants must have a good general experience of magisterial law and practice and be able, without supervision, to take a court daily (four courts sit daily).

The salary will be within the range £675 × £30—£825 and will be fixed according to qualifications and experience. This will be subject to adjustment so soon as an Award is made in respect of Justices' Clerk's Assistants.

The appointment will be superannuable and will be subject to one month's notice on either side.

The successful candidate will be required to pass a medical examination.

Applications, stating age, qualifications and experience, together with copies of three recent testimonials, must reach the undersigned not later than February 28, 1955

FRANK OWENS,
Clerk to the Magistrates' Courts Committee.

The Town Hall, Bradford.

Assistant Solicitor

BEDFORDSHIRE County Council invite applications by February 21 for the above appointment, which is superannuable, at a salary within the range £1,063 15*s.*—£1,228 15*s.* according to experience. Forms obtainable from the Clerk, Shire Hall, Bedford.

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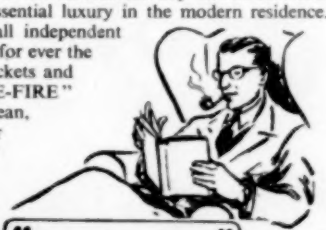

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GEO. H. EDWARDS & CO., 3 and 4 Williamson Sq., Liverpool 1. Est. 1880. Tel. Royal 2434 (2 lines).

MANCHESTER.—EDWARD RUSHTON, SON & KENYON, 12 York Street. Est. 1855. Tel. CENtral 1937. Telegrams Russoken.

LEICESTERSHIRE

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